

SHANNON E. TURNER (CSB No. 310121)
sturner@fenwick.com
FENWICK & WEST LLP
555 California Street, 12th Floor
San Francisco, CA 94104
Telephone: 415.875.2300
Facsimile: 415.281.1350

DAVID K. TELLEKSON (admitted *pro hac vice*)
dtellekson@fenwick.com
JESSICA M. KAEMPF (admitted *pro hac vice*)
jkaempff@fenwick.com
FENWICK & WEST LLP
1191 Second Avenue, 10th Floor
Seattle, WA 98101
Telephone: 206.389.4510
Facsimile: 206.389.4511

Attorneys for Defendant
Birdies, Inc.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

ROTHY'S, INC., a Delaware corporation,

Plaintiff,

v.

BIRDIES, INC., a Delaware corporation,

Defendant.

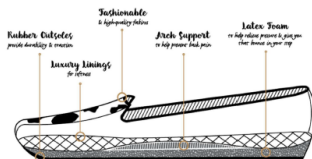
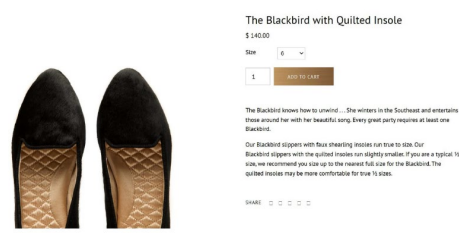
Case No.: 3:21-cv-02438-VC






**DEFENDANT BIRDIES, INC.'S TABLE
OF EXHIBITS IN SUPPORT OF ITS
MOTION FOR SUMMARY JUDGMENT
OF INVALIDITY, OR IN THE
ALTERNATIVE, NONINFRINGEMENT**




Date: February 10, 2022
Time: 10:00 am
Place: Courtroom 04, 17th Floor
Judge: The Honorable Vince Chhabria
Trial Date: November 14, 2022




Pursuant to Rule 56 of the Federal Rules of Civil Procedure, and the Court’s “Standing Order for Civil Cases before Judge Vince Chhabria,” Defendant Birdies, Inc. (“Birdies”) hereby respectfully submits the following Table of Exhibits in support of its Motion for Summary Judgment of Invalidity, or in the Alternative, Noninfringement:




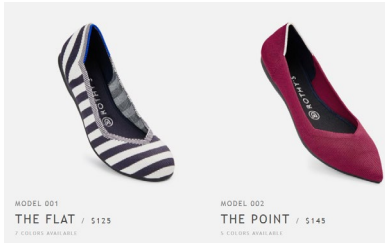
TABLE OF EXHIBITS






Attachment No.	Description
1	Table of Exhibits
2	Appendix A – Images of Asserted Patents
3	Appendix B – Comparison of Blackbirds to Asserted Patents
4	Declaration of Marisa Sharkey in Support of Motion for Summary Judgment/Noninfringement
5	Sharkey Declaration Ex. A – S.F.Chronicle.com article, dated February 14, 2016
6	<p>Sharkey Declaration Ex. B – Facebook post by Birdies, dated October 7, 2016, showing:</p> 
7	<p>Sharkey Declaration Ex. C – Birdiesslippers.com webpage “Birdies Black Smoking Slipper with Quilted Insole” (captured by the Internet Archive’s Wayback Machine on Nov. 11, 2016), showing:</p> 






Attachment No.	Description
8	<p>Sharkey Declaration Ex. D – Facebook photo of Birdies Blackbird with Quilted Insole, dated October 19, 2015, showing:</p> 
9	<p>Sharkey Declaration Ex. E – Facebook photo of Birdies Blackbird with Quilted Insole, dated October 19, 2015, showing:</p> 
10	<p>Sharkey Declaration Ex. F – Facebook photo of Birdies Blackbird with Quilted Insole, dated October 19, 2015, showing:</p> 
11	<p>Sharkey Declaration Ex. G – Facebook photo of Birdies Blackbird with Quilted Insole, dated October 19, 2015, showing:</p> 
12	<p>Sharkey Declaration Ex. H – Facebook photo of Birdies Blackbird with Quilted Insole, dated October 19, 2015, showing:</p> 





Attachment No.	Description
13	<p>Sharkey Declaration Ex. I – Facebook post by Birdies, dated December 3, 2015, showing:</p> 
14	<p>Sharkey Declaration Ex. J – Instagram post by Birdies, dated October 29, 2016, showing:</p> 
15	<p>Sharkey Declaration Ex. K – Instagram repost of Meghan Markle by Birdies, dated April 15, 2016, showing:</p> 
16	Sharkey Declaration Ex. L – Facebook post by Birdies, dated February 8, 2021
17	Sharkey Declaration Ex. M – Facebook post by Birdies, dated February 10, 2021
18	Declaration of Jessica Kaempf in Support of Motion for Summary Judgment/Noninfringement
19	Kaempf Declaration Ex. 1 – CNBC.com article dated May 24, 2021
20	Kaempf Declaration Ex. 2 – Elle.com article by Leah Clinton (captured by the Internet Archive's Wayback Machine on January 20, 2016)
21	Kaempf Declaration Ex. 3 – Excerpts from Plaintiff's Responses to Interrogatories





Attachment No.	Description
22	<p>Kaempf Declaration Ex. 4 – U.S. Patent No. 98,793, dated Jan. 11, 1870, showing:</p> 
23	Kaempf Declaration Ex. 5 – Excerpts from Frank Steinhart's deposition
24	<p>Kaempf Declaration Ex. 6 – Excerpts from <i>Shoes: The Complete Sourcebook</i>, by John Peacock (2005), showing:</p> 
25	Kaempf Declaration Ex. 7 – The Wall Street Journal article dated Nov. 7, 2012
26	<p>Kaempf Declaration Ex. 8 – The Fashion Spot.com article dated Oct. 11, 2012, showing:</p>  <p>Photos: Will Alexander/WENN.com, Stuart Castle/WENN.com, FayesVision/WENN.com</p>
27	Kaempf Declaration Ex. 9 – Your Next Shoes article dated June 9, 2013 (last visited Dec. 16, 2021)
28	Kaempf Declaration Ex. 10 – Your Next Shoes article dated June 9, 2013 (captured by the Internet Archive's Wayback machine on June 15, 2013)
29	Kaempf Declaration Ex. 11 – WWD article dated Sept. 26, 2011 by Rachel Strugatz
30	Kaempf Declaration Ex. 12 – WWD article dated Sept. 26, 2011 (captured by the Internet Archive's Wayback machine on Oct. 2, 2013)






Attachment No.	Description
31	Kaempf Declaration Ex. 13 – Shoptalk article dated July 20, 2011
32	<p>Kaempf Declaration Ex. 14 – Blondie’s Lipstick post dated Nov. 12, 2012, showing:</p> 
33	Kaempf Declaration Ex. 15 – Elle.com article and photos dated July 23, 2012
34	<p>Kaempf Declaration Ex. 16 – Instagram post dated May 7, 2013, showing:</p> 
35	<p>Kaempf Declaration Ex. 17 – Zappos.com webpage for Skechers shoes (captured by the Internet Archive’s Wayback machine on January 15, 2017), showing:</p> 
36	<p>Kaempf Declaration Ex. 18 – Rothy’s webpage showing “The Flat” and “The Point” shoes (captured by the Internet Archive’s Wayback machine on March 14, 2016) (Ex. F to Defendant’s RFAs), showing:</p> 
37	Kaempf Declaration Ex. 19 – Excerpts from Rothy’s, Inc.’s Responses to Defendant’s First Set of Requests for Admission (1–56)


Attachment No.	Description
38	<p>Kaempfer Declaration Ex. 20 – Instagram post dated June 25, 2016, showing:</p> 
39	<p>Kaempfer Declaration Ex. 21 – Instagram post dated November 28, 2015, showing:</p> 
40	<p>Kaempfer Declaration Ex. 22 – Instagram post dated March 12, 2017, showing:</p> 
41	<p>Kaempfer Declaration Ex. 23 – Instagram post dated July 19, 2016, showing:</p> 
42	<p>Kaempfer Declaration Ex. 24 – Instagram post dated March 6, 2015, showing:</p> 

Attachment No.	Description
43	<p>Kaempf Declaration Ex. 25 – Instagram post dated May 29, 2013, showing:</p> 
44	<p>Kaempf Declaration Ex. 26 – Instagram post dated June 2, 2015, showing:</p> 
45	<p>Kaempf Declaration Ex. 27 – Declaration of Daniel Haskins (“Haskins Decl.”), Controller and Chief Financial Officer at Stubbs & Wootton (filed under seal as Dkt. No. 66-2)</p>
46	<p>Kaempf Declaration Ex. 28 – Haskins Decl. Ex. A – Facebook post by Stubbs & Wootton, October 18, 2014, showing:</p> 
47	<p>Kaempf Declaration Ex. 29 – Haskins Decl. Ex. B – Facebook post by Stubbs & Wootton, April 1, 2016, showing:</p> 
48	<p>Kaempf Declaration Ex. 30 – Haskins Decl. Ex. C – Facebook post by Stubbs & Wootton, December 11, 2015, showing:</p> 

Attachment No.	Description
49	<p>Kaempfer Declaration Ex. 31 – Haskins Decl. Ex. D – Facebook post by Stubbs & Wootton, August 13, 2016, showing:</p> 
50	<p>Kaempfer Declaration Ex. 32 – Haskins Decl. Ex. E – Facebook post by Stubbs & Wootton, November 11, 2016, showing:</p> 
51	<p>Kaempfer Declaration Ex. 33 – Haskins Decl. Ex. F – Facebook post by Stubbs & Wootton, April 11, 2017 (Steinhart Dep. Ex. 5), showing:</p> 
52	<p>Kaempfer Declaration Ex. 34 – Haskins Decl. Ex. G – Facebook post by Stubbs & Wootton, May 9, 2017, showing:</p> 
53	<p>Kaempfer Declaration Ex. 35 – Haskins Decl. Ex. H – Stubbs & Wootton Invoice No. 5434, dated July 22, 2016 (filed under seal as Dkt. No. 66-3)</p>
54	<p>Kaempfer Declaration Ex. 36 – Haskins Decl., Ex. I – Stubbs & Wootton Invoice No. 5469, dated July 29, 2016 (filed under seal as Dkt. No. 66-4)</p>

Attachment No.	Description
55	Kaempf Declaration Ex. 37 – Declaration of Milicent Armstrong (“Armstrong Decl.”), Founder of Artemis Design Co.
56	Kaempf Declaration Ex. 38 – Armstrong Decl., Ex. C – Facebook post by Artemis Design Co., dated May 23, 2017, showing: 
57	Kaempf Declaration Ex. 39 – Armstrong Decl., Ex. D – Facebook post by Artemis Design Co., dated December 10, 2013, showing: 
58	Kaempf Declaration Ex. 40 – Armstrong Decl., Ex. E – Instagram post by Artemis Design Co., October 23, 2013, showing: 
59	Kaempf Declaration Ex. 41 – Armstrong Decl., Ex. G – Instagram post by Artemis Design Co., September 4, 2014, showing: 

Attachment No.	Description
60	<p>Kaempfer Declaration Ex. 42 – Armstrong Decl., Ex. J – Instagram post by Artemis Design Co., April 15, 2017, showing:</p> 
61	<p>Kaempfer Declaration Ex. 43 – 3dprint.com article, dated January 18, 2016, showing (among others):</p> 
62	<p>Kaempfer Declaration Ex. 44 – mikesounds.com article, dated February 1, 2016, showing (among others):</p> 
63	<p>Kaempfer Declaration Ex. 45 – jsshoe.com website pages (captured by the Internet Archive’s Wayback Machine on January 17, 2016), showing (among others):</p> 
64	<p>Kaempfer Declaration Ex. 46 – Declaration of Philip Paccione (“Paccione Decl.”), General Counsel, Corporate Secretary and Executive Vice President of Business Affairs at Skechers USA, Inc.</p>
65	<p>Kaempfer Declaration Ex. 47 – Paccione Decl., Ex. A – Skechers USA Line Sheet for Cleos, showing (among others):</p> 

Attachment No.	Description
66	Kaempff Declaration Ex. 48 – Paccione Decl., Ex. B – Skechers USA Line Sheet for Bikers, showing (among others): 
67	Kaempff Declaration Ex. 49 – Paccione Decl., Ex. C – Skechers USA records reflecting Inv. No. 65658243 and Customer Order No. 31040741
68	Kaempff Declaration Ex. 50 – Paccione Decl., Ex. D – Skechers USA records reflecting Inv. No. 65828229 and Customer Order No. 35351856
69	Kaempff Declaration Ex. 51 – Paccione Decl., Ex. E – Skechers USA records reflecting Inv. No. 65747571 and Customer Order No. 33623383
70	Kaempff Declaration Ex. 52 – Paccione Decl., Ex. F – Skechers USA records reflecting Inv. No. 65786049 and Customer Order No. 33812071
71	Kaempff Declaration Ex. 53 – U.S. Design Patent No. D783,242 dated April 11, 2017

Dated: December 27, 2021

FENWICK & WEST LLP

By: /s/ David K. Tellekson

David K. Tellekson

Counsel for Defendant Birdies Inc.